IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1680

MARY ALICE RELF, MINNIE RELF
and KATIE RELF, by and through
their next friend, LONNIE RELF,
Petitioners.

v.

THE HON. OLIVER GASCH, JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion. The order denying the petition for writ of mandamus, and the memorandum of Judge Leventhal, dissenting, are printed in the petition (Pet. App. A).

JURISDICTION

The judgment of the court of appeals (Pet. App. A, at i) was entered on March 3, 1977, and the petition for writ of

certiorari was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge acted within his discretion in denying a nonresident attorney permission to participate *pro hac vice* in the trial of a case, based on his determination that the attorney, in connection with another case in which he had been granted permission to participate *pro hac vice*, had made false statements on national television calculated to prejudice the standing of the Court and to impugn the integrity of one of its judges.

STATEMENT

The Rules of the United States District Court for the District of Columbia provide that an attorney who is not a member of the bar of that court or who does not maintain an office in the District of Columbia may enter his appearance and file pleadings provided he joins of record a resident attorney who does maintain an office in the District, but in order to "be heard in open court" such an attorney "must in addition secure the permission of the trial judge."[1] Melvin M. Belli was denied such permission by the respondent, Hon. Oliver Gasch, United States District Judge for the District of Columbia, to appear on behalf of the petitioners in a Tort Claims Act lawsuit in which they were the plaintiffs. The petitioners seek a writ of certiorari to review the denial by the court of appeals of

[1]Rule 1-4(a)(2). The full text of the rule is as follows: "An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any State but who does not qualify under the requirements of subsection (1) above may enter an appearance, and file pleadings in this court, provided that such attorney joins of record a member of the bar of this court who does meet the requirements of subsection (1) and who will at all times be prepared to go forward with the case. If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge."

their petition for mandamus to direct the admission *pro hac vice* of Mr. Belli.

Mr. Belli, a resident of California and member of that State's bar, requested and received permission to participate in the 1973 trial of a medical malpractice case[2] before the Hon. John Lewis Smith, Jr., of the United States District Court for the District of Columbia. The jury in that case returned a verdict of $900,000 in favor of Mr. Belli's client, but on April 18, 1973, Judge Smith granted the defendant's motion for a new trial on the ground that repeated references by Mr. Belli to insurance before the jury had so prejudiced the defendant that a new trial was necessary.

Less than a month after Judge Smith's ruling, Mr. Belli appeared on the "Merv Griffin Show," a nationally televised interview program. In the course of discussing an unrelated case which Mr. Belli said he believed he had lost because of "the friendship of the judge for the defendant,"[3] Mr. Belli stated:

> "Sometimes that happens. I had one in Washington, D.C. the other day, where the judge turns out to have the lawyer who represents all of the hospitals in the District, and we were suing the hospitals. It was his son and he was living with him. And this judge sitting on this case was excused from a similar type of case just before and told not to sit. And he sat on my case, and we didn't know anything about this. . . ."

Later in his discourse, Mr. Belli commented that both his client and the jury had been black, and that blacks in the District of Columbia "couldn't sit in the same side of the courtroom ten years ago." He stated that he thought "the

[2]*Morris v. Children's Hospital*, Civil No. 575-71 (D.D.C.).

[3]The full text of Mr. Belli's remarks is set forth in *In re Belli*, 371 F. Supp. 111, 112 n.6 (D.D.C. 1974).

judge was wrong in sitting on that case," and concluded:

> "But it's rare that those things happen. Most of our . . . Ninety-nine and nine-tenths of our judges advisedly are not only learned but are good, and things like this don't happen . . . and when they do happen, they shock me and I think they shock all of us."

On June 22, 1973, at their regular monthly executive session, the judges of the District Court unanimously adopted a resolution[4] noting Mr. Belli's televised remarks, finding those remarks to be "grossly inaccurate in important respects" and expressing the opinion of the judges that Mr. Belli had violated its rules of free press and fair trial as well as the Code of Professional Ethics. Because the court's own disciplinary Committee lacked authority to proceed except against members of the bar of the court, the resolution authorized the Chief Judge to forward the matter to the disciplinary committee of the State Bar of California for such disciplinary action as it found appropriate.

Following these events, Judge Smith recused himself from the *Morris* case on motion of the plaintiff, and the case was reassigned to the respondent, the Hon. Oliver Gasch. Prior to the retrial, Mr. Belli again moved to participate *pro hac vice* in that case. Judge Gasch, at the request of moving counsel, conducted an *in camera* hearing on this motion. At the hearing, Mr. Belli was permitted to, and did, address himself to the question of the propriety of his statements on the "Merv Griffin Show." Regarding this hearing, the petitioners erroneously state (Pet. 7-8) that it was a "thoroughly unexpected *in camera* proceeding;" that the Court did not "make any record" of the proceeding; and that Mr. Belli "had neither the requisite notice to enable him to prepare to meet the false charges hurled against him nor the opportunity to dispute the factually

[4]The resolution, which is characterized but not reproduced in the petition for certiorari, is attached as Appendix A to this brief.

inaccurate statements which the Court attributed to him." The facts, however, are as follows: (1) the hearing *was* recorded, and a transcript prepared;[5] (2) the hearing was conducted *in camera* at the *specific request of counsel* moving Mr. Belli's admission, and its subject matter was fully anticipated by Mr. Belli;[6] (3) the record reflects that, in fact, no "false charges" were "hurled" at Mr. Belli; and (4) Mr. Belli was afforded a full opportunity, indeed was invited, to "dispute" the statements that had been attributed to him, yet he did not suggest that the account of those statements was in any way "factually inaccurate."

[5]The transcript was filed in the record of the *Morris* case on January 17, 1975. The petitioners did not include the transcript in the record before the court of appeals, and as the petition for mandamus was decided without requesting a response by the district judge, it was apparently not brought to the attention of that court. In view of the factual allegations made in the petition for certiorari regarding the hearing, respondent has lodged with the Clerk of this Court a full copy of the transcript.

[6]The transcript reflects, at pp. 2-3, the following:

> [By Mr. Scherr]:
>
> . . . The reason why I asked for this bench conference is to ask whether or not it might be possible for us to take up this matter concerning Mr. Belli's practicing in the case in chambers, either recorded or unrecorded, at Your Honor's pleasure in this kind of situation.
>
> THE COURT: It would be recorded, Mr. Scherr. I would not feel confident without recording it.
>
> MR. SCHERR: I think this is the kind of situation where the formality of the courtroom may well inhibit. A more conducive atmosphere, if Your Honor sees fit, for us to go into your chambers and perhaps discuss it and come to a conclusion at that time.
>
> I discussed it with Mr. Kelp, and I discussed it with Mr. Belli, and it is a joint request of counsel on the part of the plaintiff to do it in this manner.

On February 6, 1974, Judge Gasch entered a memorandum opinion denying the motion for Mr. Belli to participate in the *Morris* case and fully explaining his reasons. The court noted that the motion was one addressed to its sound discretion, and framed the question as "whether the remarks and conduct of Mr. Belli were so impermissible as to warrant the denial of his motion for admission pro hac vice." The opinion then reviewed the remarks made in the televised broadcast, and determined each of the most significant of Mr. Belli's allegations to have been false; Judge Smith's son did not represent hospitals in the District, he did not reside with Judge Smith, and Judge Smith, while he had voluntarily recused himself in an earlier malpractice case, had not been ordered not to sit on the case. Furthermore, the courtrooms of the district court were not segregated ten years earlier, or even forty years earlier. Judge Gasch concluded that Mr. Belli had "acted in complete disregard as to the factual accuracy of his statements," and that the statements "were calculated to prejudice the standing of this Court and to cast a shadow upon its integrity and that of one of its judges. . . ." 371 F. Supp. at 113-114.

Mr. Belli did not seek review of that order, nor did he seek review when another judge of the district court, in *Davis v. United States*, Civ. No. 75-0843 (D.D.C. March 8, 1976), denied a similar application for permission to participate in another medical malpractice case after hearing counsel *in camera*.

In the meantime, the Bar of the State of California instituted disciplinary proceedings against Mr. Belli based upon the complaint forwarded by the Chief Judge of the district court below, and on a similar complaint concerning false charges made by Mr. Belli on a television program against the Chief Justice of the Ohio Supreme Court.[7] The

[7]In that incident, according to the opinion of the Administrative Committee of the State Bar (Pet. App. vii-xvi), Mr. Belli implied that (continued)

hearing committee of the State Bar conducted hearings in August 1975, and entered written findings and conclusions (Pet. App. vii-xvi) recommending that the proceedings be dismissed. The committee found that Mr. Belli "made injudicious statements to what was known to [him] to be substantial audiences," but that the State Bar had failed to prove "by clear and convincing evidence" that the statements were made with "actual malice" or with "gross negligence," standards which the Committee felt were necessitated by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).[8]

The petitioners herein filed suit against the United States and certain federal officers on February 4, 1974, seeking damages on the ground that the minor females had been subjected to sterilization procedures without the informed consent of their parents. On November 8, 1976, at a hearing on the defendants' motion for summary judgment, local counsel for the petitioners offered a motion to admit Mr. Belli — who was not present in the courtroom — *pro hac vice* as additional counsel "for purposes of trial." The Court orally denied the motion on the ground of its previous ruling in the *Morris* case. (Pet. App. at v-vi.) Sum-

[7](continued)
the Ohio Supreme Court had reversed a $365,000 verdict in favor of his client in a libel case, and stated that the Chief Justice had "prejudged" the case because "the night before the case was argued in the Supreme Court," the Chief Justice "had his arm around the publisher giving him an award for good journalism." In fact, (1) the court of appeals had reversed the award, and the Supreme Court only denied a petition for certiorari; (2) the journalism award occurred a year before the case was argued in the Supreme Court; and (3) there was no evidence that the Chief Justice had his arm around the publisher at the presentation.

[8]Petitioners assert (Pet. at 8) that "the Committee found that the statements made by Mr. Belli, though factually incorrect in certain minor respects, were substantially true," and that the Committee found "there was *no* proof that the incidental remarks at issue which were inaccurate had been made recklessly or with gross negligence or with any knowledge of their falsity." (Emphasis in original.) The Committee's opinion does not support either of these statements.

mary judgment was subsequently granted for the defendants, and the petitioners' complaint was dismissed. *Relf v. United States*, Civ. No. 74-224 (D.D.C. Jan. 29, 1977).

On December 1, 1976, the petitioners filed in the court of appeals a petition for writ of mandamus directing Judge Gasch to admit Mr. Belli *pro hac vice*. On the basis of the petition and a supplemental brief filed by the petitioners, the court of appeals denied the petition on March 3, 1977. Judge Leventhal filed a dissenting memorandum, expressing no view of the merits but stating that he would have requested a response to the petition pursuant to Rule 21(b), Federal Rules of Appellate Procedure, rather than denying the petition summarily.

ARGUMENT

1. Denial of the motion to admit Mr. Belli *pro hac vice* did not infringe his First Amendment rights.[9] In the first place, this Court has never held that the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), override the ethical obligations of attorneys to refrain from unjust or intemperate attacks on the integrity of judges before whom they practice. Second, even if the standards of *New York Times Co. v. Sullivan* were held to limit the discretion of a trial judge to decide whether a non-member of the Court's bar should be permitted to try a case before him, the basis for the respondent's action in this case is fully consistent with those standards.

More than a hundred years ago this Court observed, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355 (1872):

[9]Mr. Belli is not himself a petitioner in this Court, and there is a serious question whether his First Amendment rights may be asserted by the petitioners. In a similar situation, the Second Circuit assumed without deciding that such asserted rights of an attorney could be raised by the client. *In re Rappaport*, ____ F.2d ____, 46 U.S.L.W. 2003 (CA 2 June 14, 1977).

> "[T] he obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the Bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."

This principle was embodied in Canon 1 of the ABA Canons of Professional Ethics,[10] and is carried over in Canon 8, EC 8-6 of the Code of Professional Responsibility.[11] Professional discipline as well as judgments of contempt have been upheld for violation of this duty, where accusations were made in pleadings as well as to the press. *E.g., Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968);

[10]"It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

[11]"EC 8-6 provides, in part:

> "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

In re Chopak, 66 F. Supp. 265 (E.D.N.Y. 1946); *In re Philbrook*, 105 Cal. 471, 38 P. 884 (1895); *In re Raggio*, 487 P.2d 499 (Nev. 1971); *In re Meeker*, 76 N. M. 354, 414 P.2d 862 (1966), *appeal dismissed*, 385 U.S. 449 (1967); *In re Thatcher*, 90 Ohio St. 492, 89 N.E. 39 (1909); *State ex rel. Dabney v. Breckenridge*, 126 Okla. 86, 258 P. 744 (1927); *State Bar Comm'n ex rel. Williams v. Sullivan*, 35 Okla. 745, 131 P. 703 (1912), *Re Troy*, 43 R.I. 279, 111 A. 723 (1920); *In re Egan*, 24 S.D. 301, 123 N.W. 478 (1909).

Nothing in *New York Times Co. v. Sullivan* or its progeny suggests that the courts and the legal profession are constitutionally prohibited from imposing upon lawyers in this regard any higher standard than that they refrain from accusations made with malice. As explained by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974), the *New York Times* standard represents an "accommodation" between the need to foster a vigorous and uninhibited press and the "limited state interest present in the context of libel actions brought by public persons." It does not, as the petitioner argues, define constitutionally protected speech for all purposes, but rather defines a burden of proof and standard of care in a context that poses peculiarly acute dangers of inhibiting freedom of the press. When the context is not that of a libel suit, but rather the regulation by the courts of the conduct of attorneys permitted to practice before them, the "accommodation" struck in *New York Times v. Sullivan* is inappropriate. *Cf. In re Sawyer*, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring): "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

In the criminal context, this Court has made it clear that the *New York Times* rule does not bar a court from imposing restraints on lawyers' speech, or from sanctioning attorneys for statements that would not justify criminal prosecution or support a libel verdict in favor of a public

figure. In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), for example, the Court counseled trial courts to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," including restrictions on comments by counsel. Collaboration between attorneys and the press as to information affecting the fairness of a trial, the Court wrote, "is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 & n.27 (1976) (Brennan, J., concurring).

The inapplicability of the *New York Times* standard to speech in other specialized contexts is similarly well settled. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969), for example, the Court expressly declined to apply *New York Times* to an employer's claim of freedom of speech in talking to his employees about the consequences of union representation. An employer's comments to his employees are sufficiently different from a newspaper's comments about a public official, the Court wrote, to justify a far greater restriction on speech in the former context. As to the employer's claim that the NLRB's line between permitted prediction and proscribed threat was too vague to withstand traditional First Amendment analysis, the Court responded that an employer can avoid difficulty "simply by avoiding conscious overstatements that he has reason to believe will mislead his employees." At least the same burden of care can constitutionally be imposed on attorneys who choose to comment about courts before which they are appearing and judicial proceedings that are then pending.

The same principle — that the appropriate degree of First Amendment protection depends upon the context in which the right of speech is claimed — has been reaffirmed in a number of other cases as well. See, *e.g.*, *United States Civil Service Comm'n v. National Association of Letter Carriers*, 413 U.S. 548, 564 (1973) (the government has an

interest in regulating the conduct and the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, n.24 (1976) (commercial speech is subject to "a different degree of protection" than news reporting or political commentary, under which it may be "less necessary to tolerate inaccurate statements").

Just last term, the Court again made it clear that attorneys' speech can generally be regulated more strictly than the *New York Times* rule would permit in the area of libel law. In *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895, 4904 (U.S. June 27, 1977), after holding that advertising by attorneys may not be subject to blanket suppression, the Court noted that its ruling did *not* mean "that advertising by attorneys may not be regulated in any way." First, the Court stated that as a form of commercial speech, lawyers' advertising is subject to tighter restrictions than those permitted under *New York Times*. Second, because of the public's vulnerability to misleading claims concerning legal services, the Court wrote that "misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* And in overseeing the regulation of attorneys' speech in this context, the Court concluded, "we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." Accordingly, the petitioner's contention — that Mr. Belli was constitutionally entitled to practice *pro hac vice* in the District Court for the District of Columbia unless his conduct was so egregious as to violate the standards of *New York Times Co. v. Sullivan* — is not supported by reason or by this Court's cases.

Even if the applicability of the *New York Times* standard to admissions of attorneys *pro hac vice* were an issue warranting consideration by this Court, the present case

does not afford a proper opportunity to decide the question. In his opinion denying Mr. Belli's admission to retry the *Morris* case, the respondent held that Mr. Belli's statements were "without factual foundation," were "recklessly made," and were "calculated to prejudice the standing of this Court and to cast a shadow upon the integrity of one of its judges." Those findings satisfy the test of *New York Times Co. v. Sullivan* and are amply supported by the record before Judge Gasch.

While petitioners repeatedly state that the false statements made by Mr. Belli were "minor" or "incidental," and that his remarks on the Griffin show were "substantially true," the record shows quite the contrary. The central allegations made by Mr. Belli were that the judge's son represented the hospitals, which were the defendants in the case; that the judge's son was living with him; that the judge had been ordered not to sit on similar cases; that the judge had overturned a large verdict by a black jury in favor of Mr. Belli's black clients; and that all this happened in a court where ten years ago blacks were not permitted to sit on the same side of the courtroom with whites. Mr. Belli admitted at the hearing before Judge Gasch that he had no basis for the charge that Judge Smith's son represented the defendant hospitals, but that he had "intended" to say that his son represented the District of Columbia Medical Society (which was not a defendant in the suit) (Tr. 11). The charge that Judge Smith's son was living with him was based, Mr. Belli said, on an entry in the telephone book showing the same address for the two of them. The statement that the judge had been "told not to sit" on a similar case came from Mr. Belli's associate counsel, who at the hearing recalled that he had had conflicting information on the matter. (Tr. 28-32.) And the charge that the district court's courtrooms had been segregated ten years previously came, Mr. Belli stated, from his "historical appreciation that Washington was a segregated area." (Tr. 8.)

Mr. Belli's televised remarks were made very shortly after the judge had set aside a $900,000 verdict in favor of his clients, and at the very time that a motion was pending in the case to disqualify the judge. Furthermore, they were made in connection with Mr. Belli's contention, during the interview, that he had lost another case because of "the friendship of the judge for the defendant." There was, therefore, sufficient evidence not only to conclude that the charges made by Mr. Belli against the judge were false and recklessly made, but that he had acted with malice toward the Court.

The contention that the decision of the California State Bar, finding that Mr. Belli's remarks had not been shown by "clear and convincing evidence" to have been made with malice, was binding on Judge Gasch is no more persuasive than an argument that Judge Gasch's findings, rendered prior to the Bar's decision, were binding on that body. As the Second Circuit has observed, "The federal courts are not bound by state disciplinary rulings, but must reach their own judgments in these matters." *In re Rappaport*, ____ F.2d ____, 46 U.S.L.W. 2003 (CA 2 June 14, 1977) (slip opinion at 4186). See *Theard v. United States*, 354 U.S. 278 (1957).

2. Petitioners' argument that the decision below denies procedural due process to Mr. Belli is without merit. While respondent did deny the application in this particular case summarily without a hearing, he did so on the explicit basis of his own earlier ruling on an identical application in behalf of Mr. Belli in another case. *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974). In that case, contrary to the representations in the petition, a hearing was conducted on the record during which Mr. Belli was invited to explain or defend his conduct on the "Merv Griffin Show" or to challenge the accuracy of the account of his statements, as well as to respond to other instances of apparent improprieties which had previously been brought to the

respondent's attention.[12] No suggestion was made at that time that the statements under consideration were inaccurate reports of what he said, nor that Mr. Belli had not received a full and fair hearing, and he did not seek review of the court's ruling based upon that hearing.

Thus, even were this Court to adopt the Fifth Circuit's ruling in *In re Evans*, 524 F.2d 1004 (CA 5 1975), that notice and an on-the-record hearing are required before an attorney may be denied admission *pro hac vice* on the basis of prior misbehavior, that requirement would be fully satisfied in this case. The procedures followed by the respondent at the time of Mr. Belli's application to appear in the retrial of the *Morris* case were sufficient to meet the most stringent requirements of due process,[13] and neither the Fifth Circuit nor any other court has suggested that a new hearing should be required on the same issues when the same attorney applies for admission *pro hac vice* in the same court in a subsequent case. Indeed, the Fifth Circuit, since the *Evans* decision, has upheld the refusal of a trial judge, without a hearing, to permit an attorney to participate in the retrial of a criminal case based upon the attorney's conduct during the original trial. *United States v. Dinitz*, 538 F.2d 1214, 1223 (CA 5 1976) (en banc).

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[12]These matters — a book review in the *New York Times* of "The Best Judges Money Can Buy," which Mr. Belli explained was actually written not by him but by the author of the book, and an inquiry by the California Bar concerning advertising of the "Belli Seminars" — formed no part of Judge Gasch's reasons for denying permission to Mr. Belli to participate in the case.

[13]See *In re Rappaport*, ____ F.2d ____, 46 U.S.L.W. 2003 (CA 2 June 14, 1977), where the district judge denied an application to appear pro hac vice on the basis of prior misconduct by the attorney in his home state. The only notice or hearing was a letter from the judge to the attorney inviting him to explain his problems in his home state, and a subsequent telephone call from the attorney to the judge. The Court of Appeals held that the procedure "carefully protected the rights of the defendant and his lawyer" (slip opinion at 4187), and denied a petition for mandamus.

3. Petitioners argue that admission *pro hac vice* may be denied only where the attorney's misconduct is committed in connection with the same case in which he wishes to appear, or is of such a nature as to justify disbarment of a lawyer admitted to practice generally in the court. This argument rests on the statement by the Fifth Circuit in *In re Evans, supra,* that to support a denial of leave to appear *pro hac vice,* the prior misconduct of the attorney must rise "to a level justifying disbarment." 524 F.2d, at 1008. This statement is in apparent conflict with the decision of the Fourth Circuit in *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957), but for several reasons, this apparent conflict does not warrant exercise of this Court's discretionary jurisdiction.

First, the Fifth Circuit itself appears to have abandoned the panel's ruling in *Evans.* In *United States v. Dinitz,* 538 F.2d 1214 (CA 5 1976), the court in an en banc decision upheld the trial court's refusal to permit an attorney to participate in a retrial based upon his misconduct in an earlier trial, without any finding that such conduct constituted grounds for disbarment. While the majority distinguished the *Evans* holding, five judges in concurring opinions expressed the view that *Evans* should be explicitly modified, and three judges agreed that "whatever vitality *In re Evans* had has necessarily been dissipated by the present en banc decision." 538 F.2d, at 1226 (Brown, C.J., concurring).

Second, there is a compelling reason for application of different standards to admissions *pro hac vice* than to questions of disbarment from practice. An admission *pro hac vice* subjects the attorney to discipline by the court for his actions in the presence of the court, but the attorney does not thereby become generally subject to discipline for violation of the local bar's ethical standards. That fact is illustrated by this very case, where the Committee on Grievances of the bar of the District Court for the District of Columbia found itself powerless to proceed on the

Court's complaint, since Mr. Belli was not a member of the bar of the Court. (See App. A *infra,* p. 2a.) This fact surely entitles a court considering an application to appear *pro hac vice* to require satisfactory assurance that the attorney will comport himself in accordance with the standards expected of members of its bar, and where prior instances of a failure by the non-resident attorney to do so are found, to deny the application even though the prior misconduct might not justify the extreme remedy of disbarment.

Third, the present case does not afford a proper context for this Court to consider the issue of what standards should apply to the exercise of judicial discretion on applications for admission *pro hac vice.* No record was filed in the court of appeals, and repeated references by the petitioners to matters outside the record are, as shown above, grossly inaccurate. The court of appeals felt that the petition for a writ of mandamus was so clearly without merit that no response was requested pursuant to Rule 21(a), Federal Rules of Appellate Procedure, and no opinion was issued. And finally, the prior misconduct of Mr. Belli which formed the basis for respondent's denial of the application would, we submit, meet the most stringent standard for review of a trial court's discretion in this context, and thus affords no opportunity to consider whether a latitude greater than that permitted under *In re Evans, supra,* is appropriate.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT J. MILLER, JR.
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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Voting: Chief Judge Sirica and Judges Hart, Jones, Corcoran, Gasch, Bryant, Smith, Waddy, Gesell, Pratt, Green, Parker, Richey, and Flannery.

RESOLUTION

WHEREAS there is presently pending in this Court the case of *Morris, et al. v. Children's Hospital of the District of Columbia*, Civil Action No. 575-71; and

WHEREAS Melvin Belli, a member of the Bar of the State of California, was permitted to appear *pro hac vice* in the aforesaid case which was tried before the Honorable John Lewis Smith, Jr., United States District Judge for the District of Columbia; and

WHEREAS while a post-trial motion was pending in the aforesaid case, Melvin Belli appeared on the Merv Griffin Show on May 14, 1973 and participated in a nationwide broadcast and made remarks (appended hereto) which were grossly inaccurate in important respects and which in the unanimous opinion of the Judges of this Court were designed to reflect upon the integrity of the Honorable John Lewis Smith, Jr., upon the administration of justice generally and upon the administration of justice in the District of Columbia in particular; and

WHEREAS the aforesaid remarks of Melvin Belli, in the opinion of the Judges of this Court, constituted a violation of the rules of free press and fair trial and of that Canon of the American Bar Association Code of Professional Ethics which imposes a duty upon a lawyer to maintain a respectful attitude toward the Courts; and

WHEREAS this Court requested its Committee on Grievances to investigate the incident with a view to initiating appropriate disciplinary proceedings against the said Melvin Belli but was advised that the Committee lacks authority to proceed except on complaints registered against members of the bar of this Court;

NOW THEREFORE BE IT RESOLVED by all the Judges of this Court, meeting in Executive Session, that this Resolution be incorporated in the minutes of this session and that a copy thereof, together with a copy of the transcript of the remarks of Melvin Belli above identified, be forwarded by the Chief Judge of this Court to the Disciplinary Committee of the Bar of the State of California for such action as it deems appropriate in the circumstances.

BY THE COURT:

/s/ John J. Sirica
Chief Judge

July 11, 1973
